In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1119

CARMEN O. HERRERO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 416 F.2d 945.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1969. A petition for rehearing with suggestion for rehearing *en banc* was denied on November 24, 1969 (Pet. App. B). The petition for a writ of certiorari was filed on January 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

377-532—70

QUESTION PRESENTED

Whether the government's continued exercise of possession and dominion over land leased by the United States on which a highway was constructed and maintained by the United States for public use since 1950 constituted a taking upon expiration of the leases in 1962.

STATEMENT

In 1946 the United States acquired leasehold interests in the land here involved for the purpose of constructing and maintaining roads in and near Agana, Guam. The leases were regularly extended until 1962. As described by the court of appeals (Pet. App. A, ii),

> The property here involved now constitutes Marine Drive, the principal public highway of Guam. It runs for approximately 26 miles from the Naval Base in the south to Anderson Air Force Base in the north. It was constructed by the Government during its leasehold period. It varies in width from two-lane to six-lane and will accommodate the heaviest type of traffic.

Although the leases were not extended after June 30, 1962, no further legal action was taken by the government until 1965, when this condemnation suit and declaration of taking were filed (Pet. App. A, i-ii). During the intervening three years, the government continued to "maintain a permanent highway constituting the island's most heavily travelled main road * * *. The owners were completely and permanently excluded from enjoyment" (Pet. App. A, iii-iv).

The district court determined, on the basis of these facts, that the date of taking, and hence the appropriate date for valuation of the lands taken, was July 1, 1962. As the court of appeals noted (Pet. App. A, ii), the district court concluded "that upon expiration of the leases in 1962, continued Government possession of the lands constituted a taking by seizure under *United States* v. *Dow,* 357 U.S. 17 (1958)." The court of appeals affirmed, relying on *United States* v. *Dow, supra,* and finding *Calvo* v. *United States,* 303 F. 2d 902 (C.A. 9), on which petitioners rely, to be distinguishable (Pet. App. A, ii-iv).

ARGUMENT

The decision of the Ninth Circuit is correct and does not conflict with any decision of this Court or any other circuit. The case is of narrow significance because it turns on the peculiar facts presented; further review is thus not warranted.

1. It was on the basis of the unique facts of this case that the Ninth Circuit distinguished its own earlier decision in *Calvo* v. *United States,* 303 F. 2d 902, which similarly involved the taking of Guam land by the government, but where an abandonment upon expiration of the lease was found (see Pet. App. A, iii). By contrast, the taking in the instant case was accomplished by the government's continued possession and dominion over the land after expiration of the leases adverse to the landowners' interests. In such circumstances, a physical seizure was effected on July 1, 1962, and the fact that a declaration of taking was not filed until some later

time does not change the actual date of taking. The law applicable to this case was settled in *United States* v. *Dow*, 357 U.S. 17, 21–23, where this Court stated:

> Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. * * *
>
> Although in both classes of "taking" cases—condemnation and physical seizure—title to the property passes to the Government only when the owner receives compensation, * * * or when the compensation is deposited into court pursuant to the Taking Act, * * * the passage of title does not necessarily determine the date of "taking." The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking. It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues. * * *
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> The scheme of the Taking Act makes it plain that when the Government files a declaration before it has entered into possession of the property the filing constitutes the "taking." But neither the language nor the history of the Act provides a reliable indication as to the in-

> tention of Congress in cases, such as the one before us, where a declaration is filed *after* the Government has taken possession. Nevertheless, a number of considerations have led us to the view that in such cases the date of "taking" is the date on which the Government entered and appropriated the property to public use.

The fact that the taking here was of a permanent nature is shown by the fact that the United States, after expiration of the leases, has continued to maintain this property as the main highway of Guam (see *supra,* p. 2). It is difficult to envisage clearer evidence of an intent to appropriate the land permanently (Pet. App. A, iv).

2. The other questions raised by petitioners and the arguments in support thereof (see Pet. 11–12) are not properly before this Court, since there was no need or occasion for the court of appeals to reach them. At all events, there is no merit in any of the other claims. For example, their contention that the compensation award should include the actual value of the pavement constituting the highway, in addition to being erroneous as a matter of law, depends upon acceptance of their basic proposition that the highway reverted to them in 1962 and was retaken in 1965. Similarly, the assertion that the value of all the tracts in the area should have been determined in a single proceeding is without substance. *Carlstrom* v. *United States,* 275 F.2d 802 (C.A. 9); *Gwathmey* v. *United States,* 215 F.2d 148 (C.A. 5); *Atlantic Coast Line R.R. Co.* v. *United States,* 132 F.2d 959 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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